

HARVEY A. CATRON
JO D. MOLINARY

IBLA 98-148

Decided September 30, 1998

Amended Petition for award of costs and expenses, including attorney fees, filed pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), and implementing regulations.

Amended Petition granted in part.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

An award for costs and expenses, including attorney fees, will be granted when the Petitioners prevailed on the merits of their citizens' complaint and made a substantial contribution to a full and fair determination of the issues as required by 43 C.F.R. § 4.1294(b); however, such award shall exclude those attorney fees and costs incurred in obtaining an appellate court order for a remedy previously granted by the Board.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for Petitioners; J. Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

On January 26, 1998, Harvey A. Catron and Jo D. Molinary, Trustee of the Susan Pruitt Cloud Land Trust (Petitioners), filed a First Amended Petition for Award of Costs and Expenses (Petition) pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994). Petitioners had previously filed a similar petition which was denied as premature in Harvey Catron, 134 IBLA 244, 260 (1995). Thus, along with their current Petition, they have filed a motion to reinstate proceedings for an award of costs and expenses, and to amend their earlier petition. Petitioners have also filed a motion to expedite consideration of their Petition. For good cause shown, both motions are granted.

Petitioners seek an award of \$23,714.25 in costs and expenses relating to their participation in citizen enforcement proceedings under SMCRA to eliminate an unstable highwall. In their citizens' complaint filed on November 13, 1990, they alleged that, after the Powell Mountain Coal Company, Inc. (Powell) had completed its auger mining operations on land known as the Pruitt Heirs Tract, it violated the Virginia Surface Mining Act and implementing regulations by failing to stabilize part of the remnant of an existing highwall left by previous contour mining operations during the 1960's. The relevant State regulation provides:

(b) Remining. Where auger mining operations affect previously mined areas that were not reclaimed to the standards of this Chapter and the volume of all reasonably available spoil is demonstrated * * * to be insufficient to completely backfill the highwall, the highwall shall be eliminated to the maximum extent technically practical in accordance with the following criteria:

* * * * *

(4) Any remnant of the highwall shall be stable and not pose a hazard to the public health and safety or to the environment.

Va. Regs. Reg. § 480-03-19.819.19(b) (emphasis added).

Responding to the complaint, the Big Stone Gap Field Office (BSGFO), Office of Surface Mining Reclamation and Enforcement (OSM), issued a 10-day notice to the Virginia Division of Mined Land Reclamation (DMLR). DMLR responded that there was "no indication that this highwall presents a threat of imminent danger to public health and safety or significant imminent environmental harm." By letter dated November 28, 1990, BSGFO concluded that DMLR's response was appropriate, and decided not to take Federal enforcement action. Subsequently, Petitioners' request for informal review of BSGFO's decision resulted in an August 21, 1991, decision by the Assistant Deputy Director, OSM, concluding that DMLR had taken appropriate action, and finding that, even though a May 1991 OSM inspection had found a highwall remnant to be unstable, Powell was not legally obligated to stabilize it because it pre-dated enactment of SMCRA and had not been affected by Powell's permitted remining operations.

On September 9, 1991, Petitioners appealed the Assistant Deputy Director's Decision to the Board (IBLA 92-82). Powell filed a response dated October 15, 1991, in which it acknowledged that it had conducted remining operations in part of the highwall remnant. While Powell did not concede that the affected highwall remnant was unstable, it stated that it would act to stabilize the remnant. Subsequently, OSM notified the Board on November 7, 1991, that its decision not to take Federal enforcement action appeared to have been based on the erroneous belief

that Powell's auger mining operations had not affected any portion of the pre-SMCRA highwall remnant on the private lands at issue here. Then, on January 14, 1992, OSM notified the Board that the Assistant Deputy Director's Decision was in error, and requested that the case be remanded so that it might reconsider that Decision in light of new information that Powell's operations had affected a portion of the highwall remnant. By Order dated April 28, 1992, we set aside the Assistant Deputy Director's Decision, and remanded the case to OSM for issuance of a corrected decision.

Following the remand, BSGFO notified DMLR that it was reconsidering DMLR's response to its previous 10-day notice, which had been issued in response to Petitioners' original citizens' complaint. Subsequently, DMLR informed OSM in May 1992 that, during the pendency of Petitioners' appeal, DMLR had notified Powell that it had failed to demonstrate that the highwall remnant at issue was stable and required Powell to do so by December 5, 1991. DMLR also informed OSM that, based on its inspection of February 6, 1992, Powell had stabilized the highwall remnant by means of backfilling and grading.

Based on its review of DMLR's information, BSGFO issued another decision on June 16, 1992, concluding that the highwall remnant had been made stable by Powell, and that DMLR had taken appropriate action. Petitioners sought informal review on July 6, 1992, because OSM had failed to cite Powell for a violation. BSGFO's June 1992 Decision was affirmed by the Assistant Deputy Director in a December 16, 1992, Decision, which Petitioners appealed to the Board (IBLA 93-125).

In our November 30, 1995, Decision, we set aside the Assistant Deputy Director's December 1992 Decision and remanded the case to OSM for appropriate action with respect to the highwall stabilization. See Harvey Catron, 134 IBLA at 258. We did so because the record was devoid of any documentation regarding OSM's adjudication of Petitioners' citizens' complaint following our April 1992 remand Order. Following the Board's November 1995 Decision, Petitioners appealed to the Federal courts and on December 22, 1997, the United States Court of Appeals for the Fourth Circuit issued an Order in Catron v. Babbitt, No. 97-1449, dismissing the appeal as moot, since Petitioners no longer had a property interest in the land at issue, and vacating the Board's November 1995 Decision.

Petitioners argue that, as a consequence of their citizens' complaint and subsequent actions, they succeeded in eliminating an unstable highwall and obtained "a final order from the Board setting aside a concededly erroneous [OSM] informal review decision." (Amended Petition at 1.) They argue that, but for their citizens' complaint and subsequent actions leading up to the Board's April 1992 Order, OSM would not have made clear that Powell was legally responsible for stabilizing the unstable highwall, and that Powell would not have then taken the necessary steps to

stabilize the highwall. They specifically note that their actions, particularly showing a videotape of Powell's remaining operations to OSM, DMLR, and Powell, during the pendency of their appeal, caused Powell to admit that it had affected the highwall and resulted in OSM concluding that its August 1991 Decision as to Powell's legal responsibility was in error. Petitioners assert that the Board's April 1992 remand Order allowed OSM to reinvokethe enforcement process and resulted in DMLR inducing Powell to stabilize the highwall. They stress that "[t]he filing and prosecution of IBLA 92-82 was not merely a factor leading to stabilization of the highwall, it was the only factor." (Supplemental Brief at 3.)

In its Answer, OSM opposes granting the Petition, arguing that Petitioners are not eligible for an award of costs and expenses under section 525(e) of SMCRA and its implementing regulations. In the alternative, OSM asserts that any award to Petitioners must be significantly reduced because their attorney fees were not reasonably incurred or were not related to the administrative proceeding, and the hourly rate claimed is excessive.

[1] Section 525(e) of SMCRA authorizes the Board, as the Secretary's delegate, to assess against OSM costs and expenses, including attorney fees, "reasonably incurred" by a person for or in connection with his participation in any administrative proceeding under the Act. 30 U.S.C. § 1275(e) (1994). The applicable regulation, 43 C.F.R. § 4.1294(b), further provides that the Department may award appropriate costs and expenses, including reasonable attorney fees, reasonably incurred by any person "who initiates or participates in any proceeding under [SMCRA], and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." However, such an award will only be made where the SMCRA proceeding "results in * * * [a] final order being issued" by an administrative law judge or the Board. 43 C.F.R. § 4.1290(a). This does not mean that the final order must actually address the merits of the position advanced by the person seeking the award, thus affording it some degree of success on the merits. Kentucky Resources Council, Inc. (KRC) v. Babbitt, No. 97-9 (E.D. Ky. Feb. 20, 1998). Rather, all that is required is that the proceeding conclude with a final order and that the person seeking the award have, in the course of the proceeding, prevailed in whole or in part, achieving some degree of success on the merits. Thus, a person may be entitled to an award even where the case is settled by mutual agreement of OSM and the appellant and a final order is issued by the Board which does not resolve the merits of his appeal at all, but merely dismisses the appeal. Kentucky Resources Council v. OSM, 137 IBLA 345, 349-50 (1997), rev'd on other grounds, KRC v. Babbitt, No. 97-9 (E.D. Ky. Feb. 20, 1998).

Petitioners first argue that the Board's April 1992 Order setting aside the Assistant Deputy Director's August 1991 Decision constituted a "final order" of the Board, under 43 C.F.R. § 4.1290(a). We agree. That

order finally resolved the administrative proceeding at issue here, since it set aside the decision adverse to the Petitioners, and remanded the case to OSM for issuance of an entirely new decision based on information which disclosed that Powell's permitted auger mining operations had affected the unstable highwall remnant.

We turn to the question of whether Petitioners prevailed to some degree on the merits of their appeal of the Assistant Deputy Director's August 1991 Decision, even though the Board's April 1992 Order did not decide those merits. The United States District Court in KRC v. Babbitt recently held that an award may be based on a change in position by OSM during the pendency of an appeal by a citizen complainant if such change afforded relief to the complainant and the appeal was "causally related to the relief obtained." KRC v. Babbitt, Opinion at 15. Moreover, the Court held that the fact that the change in position occurred after the appeal was filed "raises an inference that [the] appeal was causally related to the relief obtained." Id.

In the present case, we agree with Petitioners that their appeal was causally related to OSM's subsequent change in position. Though OSM ultimately did not have to take any action, it was clearly of the opinion, following the appeal, that a violation existed and, but for Powell's action in rendering the highwall remnant stable by means of backfilling and grading, OSM would most likely have decided that it was required to take Federal enforcement action to correct the situation. As OSM notes in its Answer, once it was informed that Powell's auger mining operations had affected the highwall remnant, it "acknowledged that the admission of facts by [Powell] would invalidate the initial agency action." (Answer at 5.) Further, BSGFO's subsequent June 1992 Decision, affirmed by the Assistant Deputy Director's December 1992 Decision, was predicated on the fact that Powell had stabilized the highwall remnant and thus corrected the violation.

The record does not indicate that OSM's change in position was causally related to anything other than Petitioners' appeal. It is evident that Petitioners' persistent prosecution of their case was instrumental in bringing about the stabilization of the highwall remnant. In its Answer, OSM argues that Petitioners "have achieved, at best, a procedural victory," noting that under applicable case law, such victories are not eligible for awards. (Answer at 10.) We conclude that Petitioners achieved much more than a procedural victory. By obtaining the Board's April 1992 Order setting aside the Assistant Deputy Director's August 1991 Decision, Petitioners achieved a result which substantially contributed to their ultimate success on the merits, which is clearly compensable. See National Resources Defense Council (NRDC) v. OSM, 107 IBLA 339, 380, 96 I.D. 83, 105 (1989). Further, while Petitioners' efforts never resulted in the Federal inspection and enforcement action they sought, they brought about the stabilization of the highwall, which was the ultimate purpose of seeking such action.

Thus, we conclude that Petitioners did prevail on the merits of their original citizens' complaint. In addition, we find that they clearly made a "substantial contribution" to a full and fair determination of the issues, as required by 43 C.F.R. § 4.1294(b). They are, therefore, eligible for and entitled to an award of costs and expenses under section 525(e) of SMCRA and its implementing regulations.

Petitioners claim \$23,256.25 in attorney fees for 112.5 hours of legal services rendered by their counsel. We first address the hourly rate for computing the attorney fees. Petitioners claim that compensation should be computed at a rate of \$200 per hour prior to January 1, 1995, and \$225 per hour thereafter. They argue that these were their counsel's customary billing rates for surface mining litigation, as supported by his January 22, 1998, Declaration, and the August 9, 1995, Declaration of Gary S. Bradshaw. Petitioners also submit a September 1, 1990, National Survey Center "Billing Rate Survey," and the affidavits of a number of other practicing attorneys in support of their assertion that the hourly rates are reasonable.

Petitioners have provided satisfactory evidence of their counsel's customary billing rates. In addition, Petitioners have shown that the rates are reasonable, since they have demonstrated that the rates are considerably less than the rates which would generally have been charged by an attorney of their counsel's skill, experience, and reputation practicing before the Board in the Washington, D.C. area during the relevant time period. See NRDC v. OSM, 107 IBLA at 393-99, 96 I.D. at 112-15. Thus, we accept those rates submitted by Petitioners as the appropriate hourly rates for computing the award of attorney fees.

We next examine the lodestar amount, or the number of hours Petitioners' counsel reasonably expended on qualifying work multiplied by the hourly rates we have accepted as reasonable. See NRDC v. OSM, 107 IBLA at 373, 96 I.D. at 101. Petitioners claim entitlement to an award of attorney fees for 15 hours expended in prosecuting their petition for a rehearing before the United States Court of Appeals for the Fourth Circuit, arguing that the Court's December 1997 Order vacating the Board's November 1995 Decision enabled them to seek reinstatement of their petition for an award of costs and expenses.

Petitioners have failed to show that the attorney fees incurred by Petitioners in prosecuting their rehearing petition before the Court were "reasonably incurred," as required by 43 C.F.R. § 4.1295(b). While the Court's December 1997 Order effectively required the Board to reinstate Petitioners' Petition, the Order was not necessary because in our November 1995 Decision, we denied the Petition, subject to refiling after OSM took appropriate action in response to our decision setting aside its December 1992 Decision and remanding the case to OSM. Harvey Catron, 134 IBLA at 260. Reinstatement of Petitioners' Petition plainly did not

hinge on a Federal court vacating our November 1995 Decision. Accordingly, the attorney fees claimed are reduced by \$3,375 (15 hours multiplied by the hourly rate of \$225 per hour).

Petitioners are clearly entitled to attorney fees reasonably incurred in seeking an award of costs and expenses. 43 C.F.R. § 4.1295(b); NRDC v. OSM, 107 IBLA at 391-92, 96 I.D. at 111. However, such fees are limited by the degree of success achieved in obtaining the actual award. NRDC v. OSM, 107 IBLA at 392, 96 I.D. at 111-12. Since the above reduction results in a success rate of 85 percent and a total of 13 hours were expended in seeking an award, the attorney fees for seeking the awards are reduced to 11 hours, resulting a reduction of \$450 (2 hours multiplied by the rate of \$225 per hour).

In summary, we reduce the total attorney fees by \$3,825, and approve the remaining balance of \$19,431.25.

Petitioners have also submitted disbursements and costs in the amount of \$458. We find that all were reasonably incurred except those incurred in connection with Petitioners' petition for rehearing. Since these costs total \$84.05, the costs allowed are reduced to \$369.95.

Finally, Petitioners seek an additional \$271.81 to cover travel expenses incurred by their counsel in personally serving counsel for OSM a copy of its April 17, 1998, motion requesting the Board to expedite consideration of their Petition. The Board received the motion by standard overnight delivery 3 days later, and Petitioners have failed to show why they could not have effected similar service on OSM's counsel. Thus, these costs are denied as not reasonably incurred, as required by 43 C.F.R. § 4.1295(b).

To the extent OSM has raised other arguments to the Petition which we have not specifically addressed, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Petitioners' motion to reinstate and amend their previous petition is granted; their motion to expedite consideration of their Petition is granted; their Petition is granted in part for \$19,431.25 for attorney fees and \$369.95 for costs, for a total award of \$19,801.20.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge

